No. 80-293

SEP 24 1980
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITEX LIMITED, *et al.*,

Petitioners,

v.

DAN RIVER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MAX GITTER
345 Park Avenue
New York, New York 10154
(212) 644-8000

Counsel for Respondent

ANDREW J. PECK
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

LEWIS T. BOOKER
HUNTON & WILLIAMS

Of Counsel

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Respondent Dan River, Inc. respectfully requests that this Court deny the petition for a writ of certiorari to review the unanimous decision of the Fourth Circuit. That court's opinion, not yet officially reported, appears at [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,515.

Questions Presented

1. Whether this Court should review an interlocutory decision of the court of appeals holding that respondent was entitled, on the particular facts alleged, to at least minimal pre-trial discovery before its complaint was dismissed.

2. Whether the court of appeals erred when, in accord with every other circuit court and virtually every district court, it held that a target company has standing to seek equitable relief for an alleged violation of Section 13(d) of the Williams Act.

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RESPONDENT'S BRIEF IN OPPOSITION

Counterstatement of the Case

In the fall of 1978, petitioner Unitex Limited, a Hong Kong corporation, and its controlling directors and shareholders secretly began to acquire a substantial position in the stock of respondent Dan River, Inc., a public company listed on the New York Stock Exchange. By December 12, 1978, the complaint alleges, petitioners (alone or as part of a larger related group) had acquired more than 5% of Dan River's outstanding stock. They were therefore obligated under § 13(d) of the Williams Act, 15 U.S.C. § 78m(d), promptly to file with the Securities and Exchange Commission and to mail to respondent a Schedule 13D disclosing extensive details concerning their purchases, including the purposes of the stock acquisition. Instead of filing the required Schedule 13D, the complaint alleges, petitioners sold off enough Dan River stock on December 14, 1978 to bring their holdings just under 5%, in an unsuccessful effort to evade the statutory filing requirements.

On January 29, 1979—after organizing petitioner Mannip Limited, a shell British Virgin Islands corporation, to hold their Dan River stockholdings and after obtaining financing for substantial further purchases of Dan River stock (financing which involved more than Unitex's entire net worth)—petitioners resumed purchasing Dan River stock, and brought their holdings again above 5%.

On February 9, 1979, for the first time, a Schedule 13D was filed with the SEC and mailed to Dan River, on behalf of petitioner Mannip. That Schedule 13D, however, was plainly defective in failing to disclose certain clearly required information, and it contained a vague, self-contradictory, and inherently uninformative "purpose clause" (set out in full at 5a*).

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* Citations of numbers followed by "a" are to the pages of the appendices to the petition.

On February 22, 1979, Dan River filed a complaint in the United States District Court for the Eastern District of Virginia citing numerous omissions and misleading statements in Mannip's Schedule 13D and seeking declaratory, injunctive and other equitable relief. After a hearing on Dan River's application for a temporary restraining order, the district court ruled that Dan River's "right to [additional] disclosure [was] clear." It restrained petitioners from making any additional purchases of Dan River stock until they filed "an amended or new Schedule 13D which makes the appropriate disclosures." The court entered a restraining order and directed speedy pre-trial discovery.

Mannip and Unitex filed an amended Schedule 13D on March 1, 1979. While the new filing supplied a number of the omissions cited by the district court, it still failed to disclose certain required information and, more important, it did not rectify the inconsistencies in the "purpose clause." Indeed, the new "purpose clause" (set out at 7a), as the circuit court later noted (17a-20a), was blatantly inconsistent with the purpose clause in the first filing. For example, the intitial Schedule 13D hinted darkly at some "long term relationship" sought by petitioners, while the amended filing asserted that petitioners sought to be investors only.

The amended Schedule 13D was accompanied by a motion by petitioners to dismiss the complaint for lack of subject matter jurisdiction as moot and a motion that respondent be denied any pre-trial discovery.

Dan River amended its complaint to assert that the amended Schedule 13D—particularly the suggestion in the purpose clause that petitioners had an investment intent only—was itself false and misleading.

At a hearing on March 2, 1979, the district court vacated the temporary restraining order and refused to afford Dan River any discovery—despite the fact that the circumstances surrounding petitioners' purchases indicated that their profession of an investment intent only was at best misleading. After further briefing and argument, the district court dismissed the amended complaint as moot, saying that since the amended Schedule 13D seemed "facially" to comply with the Williams Act, and since the verification of the filing by one of the individual petitioners must be accepted at face value, no cause of action could lie. The district court's opinion, among its other deficiencies, failed to appreciate that the verification of the amended filing was made by the same person who had sworn that the initial filing was true and complete.

On appeal, a panel of the United States Court of Appeals for the Fourth Circuit unanimously reversed and remanded with instructions. The court of appeals reviewed the allegations of the complaint and the many circumstances surrounding petitioners' stock purchases which cast serious doubt on the truthfulness of the purpose clause in the Schedule 13D. It "conclude[d] that Dan River has raised sufficient questions about the defendants' compliance with the law to require further exploration by the district court and the parties into the defendants' purpose in purchasing large amounts of Dan River stock." (20a.) The court of appeals held that the district court erred in focusing only on the "facial" validity of the Schedule 13D, and remanded to permit Dan River to "see[k] the additional discovery [as controlled in the discretion of the district court] necessary for the ultimate determination of whether the Schedule filed was accurate." (20a-21a.) The court of appeals also addressed the question of Dan River's standing to seek equitable relief under Section 13(d) of the Williams Act, and it concluded, following the reasoning of *GAF Corp.* v.

Milstein, 453 F.2d 709 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972), and other circuit courts, that an issuer does have standing. (10a-15a.)

Reasons for Denying the Writ

I.

The Fourth Circuit's Interlocutory Decision Is Not Ripe For Review.

This Court has stated repeatedly that it will not review interlocutory decisions except in "extraordinary" circumstances because "many [interlocutory] orders . . . become quite unimportant by reason of the final result or of intervening matters." *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.,* 148 U.S. 372, 384 (1893). *See also Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.,* 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 230 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ [of certiorari] is not issued until final decree."); R. Stern & E. Gressman, *Supreme Court Practice* § 4.19, at 300-01 (5th ed. 1978).

There is here no "extraordinary" circumstances warranting departure from the Court's "normal practice." *Estelle* v. *Gamble,* 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting). To the contrary; the narrow, routine order of the court of appeals was based on an examination of the particular facts alleged and shown in this case. The court of appeals "emphasize[d]" that it was making no finding on the ultimate question of whether petitioners violated the Williams Act. (20a.) Upon further proceedings on remand petitioners may prevail. The order below was merely

one allowing respondent to have minimal discovery. A more "ordinary" interlocutory decision would be difficult to envisage. This is not an appropriate case for this Court to review *any* issue.

II.

The Fourth Circuit's Decision On Standing Is In Accord With The Decisions Of This Court And Every Other Circuit Court And Is Correct.

Petitioners ask this Court to consider the court of appeals' decision on the issue whether a target corporation has standing to seek equitable relief to remedy a violation of § 13(d) of the Williams Act. But that "issue"—which petitioners treated almost as a footnote point below—has generated no conflict among the circuits, no particular controversy, no spate of scholarly articles, nor any of the other indicia of importance typical of the kinds of questions that merit this Court's attention.

For the reasons set out in the Fourth Circuit's opinion (10a-15a), the unanimous view of the circuits is both in accord with this Court's decision in *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975), and is correct.

Without exception, every circuit court faced with such a suit has concluded—with the Fourth Circuit—that a target corporation may seek equitable relief under § 13(d).* The

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* *See, e.g., Treadway Companies, Inc.* v. *Care Corp.*, [*Current*] Fed. Sec. L. Rep. (CCH) ¶ 97,603 (2d Cir. Aug. 12, 1980); *Chromalloy American Corp.* v. *Sun Chemical Corp.*, 611 F.2d 240 (8th Cir. 1979); *General Aircraft Corp.* v. *Lampert*, 556 F.2d 90, 94 n.5 (1st Cir. 1977); *Stecher-Traung-Schmidt Corp.* v. *Self*, 529 F.2d 567 (2d Cir. 1976); *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719-22 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972); *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97 (7th Cir. 1970).

overwhelming majority of district court decisions are in accord.*

Petitioners rely on two district court cases which have reached a contrary result. *Gateway Industries, Inc.* v. *Agency Rent-A-Car, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,540 (N.D. Ill. June 10, 1980), *appeal dismissed per stipulation*, No. 80-1871 (7th Cir. Aug. 11, 1980); *Sta-Rite Industries, Inc.* v. *Nortek, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,613 (E.D. Wis. Aug. 1, 1980). But this Court "will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court." R. Stern & E. Gressman, *Supreme Court Practice* § 4.8, at 278-80.

Petitioners adopt *Gateway* and *Sta-Rite's* reliance on the recent decisions in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). (Petition at 10-13.) That reliance is misplaced.

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* *E.g., Kirsch Co.* v. *Bliss & Laughlin Industries, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,580, at 98,070-71 (W.D. Mich. July 1, 1980; *Wellman* v. *Dickinson*, 475 F. Supp. 783, 817 (S.D.N.Y. 1979); *W. A. Krueger Co.* v. *Kirkpatrick, Pettis, Smith, Polian, Inc.*, 466 F. Supp. 800, 803 (D. Neb. 1979); *Tally Corp.* v. *Pertec Computer Corp.*, No. C78-168V (W.D. Wash. Nov. 6, 1978).

See also, e.g., Lane Bryant, Inc. v. *Hatleigh Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,529 (S.D.N.Y. June 9, 1980); *Transcon Lines* v. *A. G. Becker, Inc.*, 470 F. Supp. 356 (S.D.N.Y. 1979); *Finanial General Bankshares, Inc.* v. *Lance*, [1978] Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D.D.C. 1978); *S-G Securities, Inc.* v. *Fuqua Investment Co.*, 466 F. Supp. 1114, 1127-28, 1132 (D. Mass. 1979); *Jewelcor Inc.* v. *Pearlman*, 397 F. Supp. 221 (S.D.N.Y. 1975); *Twin Fair, Inc.* v. *Reger*, 394 F. Supp. 156 (W.D.N.Y. 1975); *Graphic Sciences, Inc.* v. *International Mogul Mines, Ltd.*, 397 F. Supp. 112 (D.D.C. 1974); *Scott* v. *Multi-Amp Corp.*, 386 F. Supp. 44, 50 (D.N.J. 1974); *Water & Wall Associates, Inc.* v. *American Consumer Industries, Inc.*, [1973] Fed. Sec. L. Rep. (CCH) ¶ 93,943 (D.N.J. 1973); *Nicholson File Co.* v. *H. K. Porter Co.*, 341 F. Supp. 508 (D.R.I. 1972).

First, neither *Transamerica* nor *Touche Ross* involved Section 13(d) of the Williams Act. Unlike the statutes construed in *Transamerica* and *Touche Ross*, Section 13(d) does create federal rights in a discrete, readily-identified class of persons—the shareholders of the target corporation and the target corporation itself (a statutory recipient of the Schedule 13D), who have been recognized as, respectively, the beneficiaries of a specific right to certain disclosures concerning a person who acquires more than 5% of the target's stock and the entity in the best position to vindicate the shareholders' right. *See, e.g., Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

Second, the implication of a private right of action is particularly appropriate when, as here, the cause of action seeks only injunctive relief. *See Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. at 42. In contrast, the private right of action rejected by this Court in *Touche Ross* was for damages; and in *Transamerica*, while this Court refused to find a private right of action for damages under one provision (Section 206 of the Investment Advisers Act of 1940), this Court did imply a private right of action for equitable relief under another provision (Section 215) of the same Act. In short, neither *Touche Ross* nor *Transamerica* casts any doubt on the standing—implicitly recognized by this Court in *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975)—of a target company to seek equitable relief for a violation of Section 13(d) of the Williams Act.

III.

The Fourth Circuit's "Decision" On The Availability Of Appropriate Equitable Relief Is Consistent With *Rondeau*.

Petitioners challenge as error the Fourth Circuit's asserted "decision" concerning the ultimate availability of equitable relief on remand in the event a violation of Section 13(d) were proved. There is no question as to the applicable legal standard. Dan River and the courts below recognized that *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 57 (1974), requires a showing of "irreparable harm." (11a-15a, circuit court; 25a, district court.) Thus, the issue petitioners seek to pose is the application of the *Rondeau* standard to the facts of this case.* That is an insufficient reason for this Court to grant review. R. Stern & E. Gressman, *Supreme Court Practice* § 4.14, at 290-91. This Court is not a court of errors. *Id.* § 4.18, at 297-98.

Moreover, the court of appeals has not truly had an opportunity to apply the *Rondeau* standard to the "facts" of this case—the "facts" are not yet known, and will not be known until after the limited discovery ordered on remand. The Fourth Circuit's decision did not award Dan River equitable relief or even order the district court to grant such relief. Its only "decision" on this issue was passing dicta—a statement that, on remand, *if* Dan River proved that petitioners had violated § 13(d), "the district court may and should grant *appropriate* injunctive relief." (15a, emphasis added.)

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* Petitioners fail to perceive the key difference between the facts here and the facts in *Rondeau*. In *Rondeau*, the amended filing *indisputably* cured the defendants' violation under the Williams Act. Here, the very issue on remand is whether petitioners' amended filing itself was false and misleading and therefore a new violation of the Williams Act.

Petitioners argue that, by that statement, the circuit court was requiring the district court to grant injunctive relief if a violation were found, in asserted disregard of *Rondeau*. (Petition at 15.) This reading of the court's opinion is strained. Clearly, the circuit court was doing no more than reminding the district court that *if* a violation were found, the district court could grant whatever equitable relief it believed *"appropriate"*—which might include no relief if none were appropriate under *Rondeau*.

Since no equitable relief of any kind has been granted here, it would be premature for the Court to review this case on the present record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
September 24, 1980

Respectfully submitted,

MAX GITTER
345 Park Avenue
New York, New York 10154
(212) 644-8000

Counsel for Respondent

ANDREW J. PECK
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

LEWIS T. BOOKER
HUNTON & WILLIAMS

Of Counsel